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~~OCTOBER TERM, 1906.~~

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JAMES H. McKENN

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

No. 2 O
O. T. 190

SUPPLEMENTAL BRIEF ON THE DEMURRER.

J. G. CARLISLE,
For West Virginia.

Counsel:

C. W. MAY,
MOLLOHAN, MCCLINTIC & MATHEWS,
CHAS. E. HOGG.

Supreme Court of the United States,

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COMMONWEALTH OF VIRGINIA *vs.* STATE OF WEST VIRGINIA.	ORIGINAL NO. 7.

SUPPLEMENTAL BRIEF ON THE DEMURRER.

The evident purpose of the Virginia funding act of March 30, 1871, was to settle with the creditors for the full amount which the State had decided was her just share of the old public debt, and every creditor who surrendered his original bond for cancellation under the provisions of that act understood that he was being paid in the new bond all that the State recognized her obligation to pay. By presenting his bond for cancellation as required by the statute, and by accepting the certificate representing the remaining one-third, he necessarily released the State from any further pecuniary liability to him; for all the State agreed to do—if the language of the certificate constitutes an agreement—was, that the unfunded one-third "will be provided for in accordance "with such settlement as shall hereafter be had between "the States of Virginia and West Virginia in regard to "the public debt of the State of Virginia at the time of "its dismemberment." Both the act and the certificate issued under it provided that the State should hold the cancelled bonds in trust for the owners of the certificate (Record, pp. 15; 47-48).

The settlement referred to was to be made between the two States alone, and the essence of the agreement was that if anything should be received from West Virginia the holders of the certificates should have the benefit of it to the extent of their ratable shares. If Virginia had been suable, no action could have been thereafter maintained against her on this agreement unless she had actually received money in a settlement with West Virgina. Money so received would have been held in trust by the State for the certificate holders; and she now sues in that capacity for their exclusive benefit.

Unless Virginia has a valid claim in her own right against West Virginia for contribution independently of her transactions with the creditors, she cannot maintain this action. It certainly cannot be said that the issue of certificates to which West Virginia was not a party could confer upon Virginia a greater or more perfect right with respect to the unfunded one-third than she would have otherwise possessed; and, in fact, it is conceded by counsel that the liability of West Virginia is in no way affected by the issuance of the certificates. Although counsel insist that Virginia was not released from pecuniary liability under the act of 1871, yet the Attorney General, in his reply brief, says:

> "While the creditor, as the result of this arrangement, took the risk of such a settlement ever being made, it was none the less the duty of Virginia to do all that she could, or all that could be reasonable and fairly expected of her, to bring about and effect such a settlement; and, her repeated efforts to that end having proved abortive by reason of the failure of West Virginia to meet her overtures, this suit has become necessary."

The next funding act was passed March 28, 1879. It provided for the surrender and cancellation of the outstanding bonds and for the issue of certificates, and ex-

pressly declared that "The acceptance of said certificates "for West Virginia's one-third issued under this act shall "be taken and held as a *full and absolute release* of the "State of Virginia for all liability on account of said "certificates" (Record, p. 19). Notwithstanding this plain provision of the act, it is contended in one of the reply briefs that Virginia was not released from liability for the sums represented by the certificates issued under it. Of course, it was not necessary to provide that the State should be released from any part of the old bonds, because they had all been surrendered to her and cancelled, and no longer constituted, even apparently, an obligation upon her part.

The next act, which was passed February 14, 1882, also provided for the surrender and cancellation of the outstanding bonds, and for the issue of certificates for the unfunded one-third, "to be accounted for by the State of "West Virginia without recourse upon this commonwealth" (Record, pp. 28-29).

The next and last funding act was passed February 20, 1892, and it also required the surrender and cancellation of the outstanding bonds and the issue of certificates for the unfunded portion "to be accounted for to the holder "of this certificate by the State of West Virginia without "recourse upon this commonwealth" (Record, p. 30).

The foregoing references to the statutes show the relation which the State of Virginia bore to the unfunded part of the debt when the joint resolution of March 6, 1894, was passed constituting a commission to negotiate with West Virginia, upon the express condition, however, that it should "in no event enter into any negotiations "thereunder except upon the basis that Virginia is bound "only for two-thirds of the debt of the original State, "which she has already provided for as her equitable pro-"portion thereof" (Record, p. 40).

This was followed by the act of March 6, 1900, which

authorized the commission to take the certificates on deposit "upon an agreement and contract on the part of the "holders of said certificates that if the said commission "would secure a settlement with West Virginia with respect to said certificates, the holders of said certificates "so deposited will accept the amount realized on such "settlement from West Virginia on said certificates as a "full settlement of all their claims thereunder" (Record, p. 42). And it was further provided that the commission, with the advice and approval of the Attorney General, might take such action and institute such proceedings "on behalf of the State" as might in their judgment be needful and proper to "bring about and carry into effect a settlement as aforesaid;" but it was expressly provided that the owners of the certificates should defray all the expenses involved in connection with the proceedings "and the State shall not be subject to any expense on that account" (Record, .pp. 42).

The contracts exhibited with the bill, which are set forth in full in our original brief, show that the holders of the certificates which were deposited with the commission agreed to all the terms and conditions of the acts last referred to; and the record shows that before the institution of this suit certificates to the amount of $13,173,435.41 had been deposited with the commission. Of this amount $10,851,294.09 were issued under the act of 1871 (Record, p. 89). Certificates held by the State of Virginia or by the commissioners of the sinking fund and literary fund amounting to $2,745,462.01 have not been deposited, of which $2,578,518.68 were issued under the act of 1871 (Record, p. 90). If Virginia owes any part of the debt represented by these certificates, she owes it to herself on acount of obligations created for her own exclusive benefit, and West Virginia could in no event be responsible for any part of it.

The dissenting opinion of Judge Staples in the case of

Antoni vs. *Wright*, 22 Grattan (62 Va.), p. 838, and the cases of *Higginbotham* vs. *Commonwealth*, 25 Grattan (66 Va.), p. 628, and *Greenhow* vs. *Vashon*, 81 Va., 341 are cited by counsel in support of their contention that Virginia was not released by the act of 1871 from the obligation to pay the unfunded one-third of the debt. But an examination of the cases shows that no such question was involved, or could have been involved, in either of them.

In *Antoni* vs. *Wright*, decided in 1872, the question was as to the constitutionality of the Virginia act of 1872, repealing the provision of the act of March 30, 1871, which made the coupons receivable for taxes. The court, in a very able opinion, held that the repealing act was unconstitutional. Anderson, *J.*, in delivering a concurring opinion, said:

> "It matters not whether the State is released from "the one-third of the debt or not; if a new bond had "been given for the whole of the debt, it would have "been a valid obligation for a valuable consideration. "Whether the State is released or not for one-third "of the debt, it is very clear that in this transaction "she has only assumed to pay two-thirds of it. And "I could not say that she is bound for any more. "That question, though one of great interest to the "State, is not involved in this case" (p. 873).

We call the attention of the court also to what was said by the court on page 840 of the report.

In *Higginbotham* vs. *Commonwealth*, decided in 1874, the question was whether the State was bound under certain acts of the legislature to pay dividends on the stock of the James River & Kanawha Company. It was contended by the Attorney General for the State that the two States were bound ratably to the stockholders for the dividends agreed to be paid, and that Virginia was, therefore, released from one-third of it by the dismemberment. The court expressed the opinion that they were bound

ratably, but that Virginia was not released, and, speaking of the State's attitude, said:

> "By the payment of the whole debt, an equity at "once arises in her favor to demand contribution "from the other State which she may enforce in the "United States Courts; a right secured to States but "denied to individuals. She cannot suffer, there- "fore, by doing right. Virginia has not lost her "identity by the loss of forty-eight counties and the "inhabitants thereof."

In the course of its opinion, the court further said:

> "It is scarcely necessary to add that in what has "been said above it had not been my purpose to ex- "press or intimate any opinion as to the respective "rights and liabilities of the State and those of her "creditors who have accepted the provisions of the "act of March 30, 1871, commonly called the funding "act. That question is not before us, even inci- "dentally, and no opinion is expressed thereon." (p. 636.)

There had been no adjustment between the State and the stockholders who sued in that action, as there had been with the holders of the old public debt, and therefore there was no foundation for the claim that the State had been released from any part of the liability for dividends. The position assumed by the court that West Virginia was liable directly to the creditors for her just proportion of the debt is not insisted upon by counsel in this case. On the contrary, it is conceded that if West Virginia is liable for contribution, it is to Virginia alone.

In 1886, when the case of *Greenhow vs. Vashon* was decided, the entire personnel of the court had been changed as a result of the controversy over the readjustment of the public debt. It was a proceeding to compel the treasurer of the State to receive coupons in payment of taxes, and the court held that he could not be compelled

to do so because the funding act of March 30, 1871, was unconstitutional and void!

We think it is clear that Virginia has been released by the provisions contained in the various funding acts, by the surrender and cancellation of the bonds, by the acceptance of certificates under the acts, and by the contracts entered into between the creditors and the commissions; but, even if there had been no formal or voluntary release, the State has repeatedly declared in the funding acts and in the joint resolution of March 6, 1894, and the act of March 6, 1900, under which this action is brought, that she is not liable for the unfunded one-third of the debt. These declarations amount to a positive refusal to pay, or to fund, that part of the debt, and are therefore equivalent to a direct repudiation of the State's obligation to that extent.

Under these circumstances, what possible pecuniary interest can the State have in the claims alleged against West Virginia? But, no matter whether Virginia has been released or not, and no matter whether she has repudiated the one-third or not, she sues in this action for contribution, and no such suit can be maintained until she has actually paid, or in some way settled, more than her share of what her counsel call the "common indebtedness." She has decided for herself, with the consent of her creditors, what her just share was, and she has neither paid nor extended anything in addition. No authority has been cited, and we are not aware that any exists, showing that one co-obligor—and the States are not co-obligors—can maintain an action against another, either at law or in equity, for contribution, before he has paid more than his own just proportion of the joint indebtedness. The only authority relied upon by counsel on the other side in support of their contention on this point is *1 Spence, Equity Jurisprudence, p. 662;* but that citation has no bearing upon the question.

Speaking of the right to sue for contribution, the author says:

> "If one of several sureties paid the whole or more "than his proportion of the debt, he might compel "his co-surety to contribute proportionately to the "amount so paid. So if the original debtor, or one "of the parties liable, becomes insolvent, each of the "solvent parties was made to contribute to the obli- "gation thrown upon them."

He then states what the Roman law was upon the subject of contribution, and, still speaking of that law, he makes the following statement, which is the only quotation made by counsel on their brief:

> "It *was* not necessary to wait till some one was "damnified by having paid or having claim made "against him for the whole; a bill might be filed to "settle the amount due from each individual of a "body liable to a common burden, and to compel the "payment by each, of his share." (*Original brief,* p. 18.)

We have said that there are no co-obligors in this case, and that is conceded by counsel on the other side. The bill is not framed upon the theory that West Virginia was ever bound to the holders of the old bonds, or that she is now bound to the holders of the certificates issued by the State of Virginia, either as a co-obligor or otherwise. The claim is made against her by Virginia alone, and it has been argued throughout the case that the indebtedness is to her. If the old bonds had been secured by a lien upon the public property situated in the new State, or by a pledge of the revenues to be derived from the people or territory embraced in the new State, it might have been contended that there was a direct liability to the creditors upon the part of West Virginia; but such was not the case. The bonds of a State, as this court has often said, are secured only by a pledge of its honor and

good faith; and Virginia is still the same State that issued and sold the bonds. It cannot be necessary to make an argument to show that neither this court nor any other has power to exonerate her from any part of her liability. Even if such a power existed in any court, the creditors whose claims would be extinguished by the exoneration would be indispensable parties.

It is now contended by counsel for the plaintiff that there never was a compact between the two States with reference to the old public debt, and that no consent to the formation of the new State was ever given by the legislature of Virginia; and it is said that the question as to the existence of the compact cannot be relied upon by the defendant State in this argument because it is not specifically stated as one of the grounds of demurrer. The compact is set forth in the bill (pp. 4–6), and one of the separate grounds of demurrer is that the court has no jurisdiction to hear and determine the cause, which necessarily requires it to ascertain the foundation and character of the claim asserted and the nature and extent of the remedy sought by the plaintiff. The office of a demurrer is to present to the court the legal and equitable questions arising upon the face of the pleading—not to argue them —and one of the questions presented by the demurrer in this case is whether, if the compact is valid, the court has power to enforce it according to its terms.

We do not propose to reargue the question as to the existence of the compact or to discuss the validity of the Virginia act of May 13, 1862, consenting to the formation of the new State and asking its admission into the union under the constitution which had then been framed. The compact itself was entered into by the sovereignty conventions of the two States and consented to by Congress in accordance with the provisions of Clause 3 of Section 10 of Art. 1 of the constitution of the United States, and all that was required of the legislature of Virginia by Clause 1

of Section 3 of Art. 10 of the constitution was that it should give its consent, not to the compact, but to the formation of the new State out of a part of the territory of the old State.

Counsel claim in the reply briefs that the ordinance of the Wheeling Convention requiring West Virginia to assume a just proportion of the debt and prescribing the method of ascertaining it is binding upon that State, but deny that the conditions upon which the proposition was accepted are binding upon Virginia (Mr. Conrad's brief, pp. 22–23). We insist that the compact is binding as a whole or it is not binding at all, and that the act of the Virginia legislature, passed May 13, 1862, while it was not necessary to the validity of the compact, constituted a ratification of it by that body. Without this act the State of West Virginia could not have been constitutionally formed or admitted into the union, whether there was a compact or not.

Congress never passed but one act providing for the admission of the State into the union, and when it was afterwards actually admitted by the proclamation of the President, the constitution which Congress had already approved had not been altered in the slightest respect so far as it related to the compact between the two States. The only change that had been made, or that was required to be made, by Congress, was in relation to the institution of slavery.

But it is now argued that the compact between the two States has been abrogated by the omission of the State of West Virginia to include in the constitution of 1872 the same provision in regard to the old public debt that was contained in the constitution of 1862 under which the State was admitted into the union; but, notwithstanding this contention, it is still insisted by counsel that West Virginia became liable and is now liable for a just proportion of the debt as provided in the Wheeling ordinance,

and which it is claimed constituted a part of the compact. The entire compact was that the new State should take upon itself a just proportion of the public debt, to be ascertained by charging to it all the State expenditures within its limits, and a just proportion of the ordinary expenses of the State Government since any part of the debt was contracted, and deducting therefrom the moneys paid into the treasury of Virginia from the counties included within the new State during that period, and that the legislature of West Virginia should ascertain the same as soon as practicable and provide for its liquidation by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years.

This compact was entered into by the sovereignty conventions of the two States. In one the proposition was made in the form of an ordinance, and in the other it was accepted in the form of a constitutional provision; and then it was consented to by Congress, and thus became an absolute and permanent obligation of the two States, which neither of them could thereafter abrogate or alter. It was not necessary for West Virginia to repeat in a subsequent constitution the terms upon which she had accepted Virginia's proposition, and upon which the compact had been concluded with the consent of Congress. The compact itself provides that the new State shall assume a just and equitable proportion of the debt, and that the Legislature of that State shall ascertain what that proportion is, and establish a sinking fund sufficient to pay the interest and redeem the principal in thirty-four years. The latter part of the compact is as binding upon the two States now as it ever was. The legislature of West Virginia has not been abolished; it still exists and possesses full power to provide for the ascertainment and payment of the State's just proportion of the debt in accordance with the stipulations of the compact between the parties. The State of Viriginia has not

heretofore supposed that West Virginia had extinguished her obligation to assume and pay a just property of the debt, or that she could do so; but if the argument now made is sound, she has done so by merely omitting a part of the compact from her constitution.

The act of Congress admitting the State into the union and thereby, as this court has held, giving the consent of that body to the compact, is a law of the United States enacted in pursuance of the constitution, and is therefore the supreme law of the land; and the compact itself constitutes a part of that law. *Penna.* vs. *Wheeling Bridge Co., 13 How. 185.* No State can abolish it or change it, even by an affirmative act, much less by a mere omission to repeat it in her constitution or statutes.

It is true, as stated in one of the reply briefs, that nearly forty-four years have passed since the compact was made, but it is also true that Virginia has repudiated it ever since 1871; and, although she has in her own exclusive possession all the accounts and vouchers necessary to effect a settlement, she has never presented to West Virginia any account, or even part of an account, which would enable the Legislature of that State to take any action in accordance with the Wheeling ordinance. It will be time enough for Virginia to make complaint against West Virginia when she has furnished that State with such an account or statement as will enable her Legislature, or a commission appointed by it, to ascertain the amount claimed, in the manner prescribed by the Wheeling ordinance, which was Virginia's own chosen method of adjustment.

The reference to the fact that this court entertains jurisdiction of appeals from the Court of Claims involving demands for money, and renders judgments in such cases, is of no consequence in this discussion, because Congress has by statute not only consented that the United States might be sued on such claims, but has expressly author-

ized judgments to be rendered and directed their payment by the Secretary of the Treasury out of the general appropriations.

Act of March 3, 1863, Ch. 92, sec. 7; 12th, Stat. 766; Act of September 30, 1890, Ch. 1126, sec. 1.

The case of *Carter* vs. *State*, *42 La. Ann., 930*, quoted from in the original brief of counsel for plaintiff, is not at all in conflict with our contention in the case at bar. That was a proceeding to subject money belonging to the State to the satisfaction of a judgment previously obtained, and the court decided that it had no power to do so, although the legislative had authorized the institution of the action in which the judgment was rendered. In the course of its opinion, the court said:

> "The incidents and appurtenances of ordinary ju-
> " risdiction have no application to a case like this.
> " Undoubtedly jurisdiction granted to render judg-
> " ments between parties subject to judicial power
> " and control implies power to execute such judg-
> " ment. But the sovereign is not subject to judicial
> " power and control except just so far as is consented
> " thereto; the moment the limit of that consent is
> " reached, the judiciary must instantly halt."

But it is said by counsel that this court can afford adequate relief because it can ascertain and declare West Virginia's proportion of the debt, and that this will operate to exonerate Virginia from any further liability on account of the indebtedness. The adjudication would have no such effect; on the contrary, if Virginia is now liable, as her counsel contend, the effect of such adjudication would be simply to fix the amount of her liability, but with no judgment or decree for its payment. How that could afford any relief to Virginia in any respect, or to her creditors, we are unable to see.

While we do not consider it necessary to add anything to the argument heretofore made on that part of the

demurrer which raises the question of multifariousness, it is proper to say that we do not controvert any of the propositious stated in Hogg's Eq. Proc., which is relied upon by counsel for plaintiff. They are in accord with the authorities cited by us.

Counsel quote from Mitford's Pl., p. 399, to show that there can be no misjoinder unless the parties have, or may have, conflicting interests in the suit, or unless some of them have no interest in the suit. What the author says, is:

> "If the plaintiffs actually have, or may have, con-
> "flicting interests in regard to the object of the suit,
> "or if any or either of them have no interest in the
> "subject-matter of the suit, there is a misjoinder.
> "But to be free from the objection of misjoinder it
> "is not necessary that a co-plaintiff should have an
> "identity of interest."

They also refer to Daniels' Chancery, pp. 301–2, to show that an auctioneer may be joined with the vendor in a suit against the purchaser, but they omit to state, or quote, the reason given by the author, which is—

> "because the auctioneer has an interest in the con-
> "tract, and may bring an action upon it; he is also
> "interested in being protected against the legal lia-
> "bility he has incurred in an action by the purchaser
> "to recover the deposit" (pp. 301–2).

He then says:

> "Upon a similar principle in cases where all the
> "plaintiffs have an interest in the subject of the suit
> "but their interests are distinct and several, they
> "will not be allowed to sue together as co-plaintiffs"
> (p. 302).

It is not usual to embody the speech of an advocate in a bill in chancery, and thus require the defendant to admit on demurrer the truth of the statements contained in it; yet that course has been pursued in the present case,

and counsel on the other side quote from the speech of Mr. Harrison to show that the ultimatum contained in the joint resolution of March 6, 1894, had been abandoned by Virginia in 1900. All that we can say in response to this is that the gentleman who made the speech had no authority from the State of Virginia to propose or agree to any settlement except upon the basis that the share of the State was only two thirds of the debt. An examination of the act of March 6, 1900, will show that its preamble reaffirms the position which the State of Virginia had previously taken with respect to the extent of West Virginia's obligation for one-third of the debt, and that it does not repeal or modify any part of the joint resolution of March 4, 1894, but merely authorizes the commission to receive the certificates on deposit and to "take such action and institute such proceedings on behalf of the State as may in the judgment of the Commission and the Attorney General be needful and proper to protect the interests of the State and bring about and carry into effect a settlement as aforesaid." Under this act the commission had no power to settle by negotiation except upon the basis that Virginia had paid her full share—two-thirds—but it was authorized to sue for a settlement for the benefit of the certificate holders, and, of course, if less than one-third should be recovered from West Virginia in the suit, they had the power to receive it for distribution among the beneficiaries under the contract made with them.

J. G. CARLISLE,
For West Virginia.

Counsel:

C. W. MAY.
MOLLOHAN, MCCLINTIC & MATHEWS.
CHAS. E. HOGG.